U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 31 August 2005

BALCA Case No.: 2004-INA-80
ETA Case No.: P2003-VA-03389945

In the Matter of:

US COM,
Employer,

on behalf of

JORGE JIMENEZ ABARCA,
Alien.

Appearance: Germaine W. Sobral, Esquire
Falls Church, Virginia
For the Employer and the Alien

Certifying Officer: Stephen W. Stefanko
Philadelphia, Pennsylvania

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer of an application for alien employment certification. Permanent alien employment certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) (hereinafter "the Act"), and Title 20, Part 656 of the Code of Federal Regulations.[1] We

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal

base our decision on the record upon which the Certifying Officer (hereinafter "CO") denied certification and the Employer's request for review, as contained in the appeal file (hereinafter "AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On January 22, 2002, US Com (hereinafter "the Employer") filed an application for labor certification to enable Jorge Jimenez Abarca (hereinafter "the Alien") to fill the position of Field Service Engineer in the Northern Virginia area. (AF 30). A Bachelor's degree in electrical engineering or a related field and two years of experience in the job offered were required. The Employer filed a request for Reduction in Recruitment (hereinafter "RIR") processing with its application for certification. The Employer's address on the application was listed in Jackson, Michigan.

On July 23, 2003, the CO issued a Notice of Findings, (hereinafter "NOF"), proposing to deny certification. (AF 23-24). Citing to section 656.20(c)(8), the CO questioned whether a *bona fide* job opportunity existed and specifically, whether the position of Field Service Engineer actually existed with the Employer in Northern Virginia. The CO also noted that the job opportunity must be clearly open to U.S. workers. The Employer was directed to provide documentary evidence, including a lease agreement, photographs of the US COM Northern Virginia location, payroll records, staffing charts of Northern Virginia employees, and Federal tax returns or other records documenting that US COM conducted business in Virginia. The Employer was also required to prove that the job existed with the same job duties and requirements before the Alien was hired or that a major change in its business operation caused the job to be created after the Alien was hired. (AF 24).

In rebuttal, counsel for the Employer submitted a letter dated August 14, 2003, requesting that its application be transferred to the Michigan Jobs Commission, Employment Service Agency for processing because the Employer's home office was

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Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

located in Jackson, Michigan. (AF 22). The Employer contended that at the time of filing, it was conducting business in Northern Virginia and expected to have a permanent, full-time position available in the area in the future. The Employer conceded that while it did perform work in Northern Virginia, it was not a year-round, full-time position. It was therefore requested that the application be transferred and that the original receipt date be retained. The Employer did not submit any of the documentation requested in the NOF.

A Final Determination (hereinafter "FD") was issued on September 2, 2003, denying certification. (AF 20-21). The CO rejected the request to transfer the application to Michigan, indicating that the Employer could file in Jackson, Michigan with a new priority date in six months from the date of the denial of certification.

The Employer filed a Request for Reconsideration which was received on October 6, 2003. (AF 5-19). Included was documentation not previously submitted to the CO, but seemingly provided in response to the findings within the NOF and FD. The Employer argued that the Alien would be working out of a location in Arlington, Virginia on a contract with Qwest Communications as a US Com employee for the foreseeable future. Also included was a revised ETA 750A, wherein it was indicated that the address where the Alien would work was "various locations in Eastern Region out of 4250 Fairfax Drive, Arlington, VA 22203."

The Request for Reconsideration was denied by the CO on October 10, 2003 on the grounds that it did not raise issues which could not have been addressed in rebuttal. (AF 4). The Employer then filed a Petition for Review of Denial of Certifying Officer with the Board. (AF 1-3). In its Petition for Review, the Employer requests review of the denial of the Motion for Reconsideration and in the alternative, the denial of the request to transfer the case to Michigan. The Employer argues that its Motion for Reconsideration was improperly denied because the NOF did not adequately provide the Employer with an opportunity to rebut or cure the alleged defects. The Employer contends that because it could not provide any of the requested evidence, it assumed that it would not be possible to rebut the NOF. The Employer argues that it was not until it

had provided documents in support of its request to transfer the case did it realize that a *bona fide* job opportunity did exist in Virginia, and at that point, it amended the ETA 750A to reflect the Virginia address and provided "more than legally sufficient evidence of the bona fides of the position offered." The Employer argues that it reasonably misinterpreted the NOF due to the "unduly restrictive language" used by the CO and that the CO abused his discretion by failing to consider the untimely evidence. Alternatively, the Employer contends that it was error to refuse to transfer the case to the local office in Michigan. Given its good faith filing in the wrong office, the Employer argues that it should not be penalized with a six month delay before it is allowed to re-file.

This matter was docketed by the Board on February 19, 2004. The Employer filed a Statement of Position on March 31, 2004, indicating that the Employer's position was stated in the Petition for Review. The Employer contends that this matter should be remanded with instructions that the CO consider the evidence and arguments proffered in the Request for Reconsideration "due to the misleading nature of the Findings issued by the Certifying Officer."

DISCUSSION

It is well-settled that the employer bears the burden of proof in certification applications. 20 CFR § 656.2(b); *see Giaquinto Family Restaurant,* 1996-INA-64 (May 15, 1997). Here, the CO explicitly directed the Employer to submit documentation establishing that the position of Field Service Engineer in Northern Virginia is a *bona fide* job opportunity open to qualified U.S. workers, such as a lease agreement, photographs, payroll records, staffing charts, Federal tax returns, "or other records documenting [] US Com conducting business in Northern Virginia." (AF 24). The CO also explicitly requested documentation establishing that the job, as described, existed before the alien was hired, such as a staffing chart listing each employee by title, function, salary, and work schedules in Northern Virginia. The CO then clearly instructed that the Employer's rebuttal material must be mailed by certified mail "on or before **August 27, 2003**." (AF 23) (emphasis original).

The Employer, however, failed to provide any of the requested documentation in response to the CO's NOF. Instead, the Employer submitted a letter dated August 14, 2003, in which the Employer's attorney, Germaine Sobral, requested transfer of the application, and explained that US Com was conducting business in Northern Virginia and "expected" to have a permanent, full-time position available in the area. (AF 22). The letter contains neither a request for clarification of the NOF nor any other indication that the CO's NOF was unclear or ambiguous. Nevertheless, the Employer now contends that the NOF and Final Determination were "misleading." We disagree.

Citing to section 656.20(c)(8) in both the NOF and FD, the CO fully and clearly explained that the Employer was required to submit documentation establishing that a *bona fide* opportunity exists. In other words, the Employer had to sufficiently prove that the position of Field Service Engineer is a true, permanent and full-time job at US Com in the Northern Virginia area; not simply a position that exists on paper.[2] Thus, the CO carefully listed the specific type of documentation necessary to sufficiently rebut the findings.

If the CO reasonably requests specific information to aid in the determination of whether a position is permanent and full-time, the employer must provide it. *Collectors International, Ltd.*, 1989-INA-133 (Dec. 14, 1989). Moreover, if the CO's request for documentation having a direct bearing on the resolution of an issue is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). Here, the Employer provided nothing more than a statement from its attorney assuring that it expects to have a full-time position available. Although an employer's written assertion constitutes documentation under *Gencorp*, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

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[2] *See Pasadena Typewriter and Adding Machine Co., Inc. v. Department of Labor and Alirez Rahmaty v. United States Department of Labor*, No. CV 83-5516-AAH(T) (C.D. Cal. Mar. 26, 1984) (unpublished Order Adopting Report and Recommendations of Magistrate); *Amger Corp.*, 1987-INA-545 (Oct. 15, 1987) (*en banc*).

Although it is clear that the Employer did not provide the proper documentation to meet its burden as requested, the precise issue on appeal is whether the CO properly denied reconsideration. Contrary to the Employer's arguments, we find that the NOF was clear and unambiguous. Indeed, the NOF provided the Employer with every fair opportunity to rebut the findings by setting forth the precise deficiencies in the Employer's application along with the means by which to cure those deficiencies. In addition, the CO did not request any documentation which would have been difficult to obtain. It is well-settled that rebuttal following the NOF is the employer's last chance to make its case. Consequently, "it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued." *CARLOS UY III,* 1997-INA-304 (Mar. 3, 1999) (*en banc*). In other words, the documentation submitted along with the Employer's motion for reconsideration—because it was not submitted in response to the NOF as instructed—does not constitute sufficient evidence to meet the Employer's burden to establish a *bona fide* job opportunity.[3]

We find that the CO did not abuse his discretion in denying the Employer's request for reconsideration. The CO has inherent authority to review motions for reconsideration. That does not mean, however, that a motion for reconsideration must always be granted. Where, as here, there is no reason to cast doubt on the correctness of the NOF or Final Determination, reconsideration is not appropriate. *See Harry Tancredi*, 1988-INA-441 (Dec. 1, 1988) (*en banc*). Indeed, there is no indication that the CO inadvertently omitted a crucial aspect of the NOF, committed some type of oversight, prevented the Employer from rebutting the NOF, misled the Employer in any way, or otherwise failed to provide the Employer with a full opportunity to rebut his findings. *See id.* As the CO explained, the Employer's request for reconsideration did not raise

[3] The fact that the Employer submitted rebuttal material at all begs the question: if the NOF was "misleading" as the Employer now contends, why—without further explanation or clarification from the CO—did the Employer eventually submit some of the documentation requested in the NOF along with the Employer's request for reconsideration? On appeal, the Employer has provided no answer to that question.

issues which could not have been addressed in rebuttal.[4] The Employer simply chose not to submit the documentation requested in the NOF until it filed a Motion for Reconsideration. Now, the Employer would like yet another opportunity to respond to the CO's findings because the NOF was somehow "misleading."[5]

Unfortunately, the CO's authority to grant reconsideration is not designed to provide an employer with another bite at the apple, particularly when the Employer had every fair opportunity to rebut the clearly-articulated findings. Accordingly, we agree with the CO's decision to deny reconsideration, and his denial of labor certification was, therefore, appropriate.[6]

This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.,* however, this panel recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless, such as, here, when a finding of a lack of a *bona fide* job opportunity exists. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004).

Based on the foregoing, we find that the NOF and FD were not misleading, and that the CO properly denied reconsideration based on the Employer's failure to

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[4] It is also significant that the Employer's request for reconsideration contained no argument that either the NOF or FD was misleading.

[5] It should be noted here that the Employer admitted that it did not realize that a *bona fide* opportunity existed in Northern Virginia until after it filed the application, and that it could not provide any of the requested evidence.

[6] The Employer also argues that "[its] request to transfer the case to the Michigan SWA [was] improperly denied." However, the Employer has offered no reason explaining how its desire to transfer the application has any bearing on the issue before the Board: whether the CO properly denied the Employer's motion for reconsideration because of the Employer's failure to establish that a *bona fide* opportunity exists in Northern Virginia. There is nothing in the record indicating that had the Employer been permitted to file its application in Michigan, it would have been in a better position to establish that a *bona fide* opportunity exists in Northern Virginia.

demonstrate that a *bona fide* job opportunity exists. Accordingly, we find that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.